

FEDERAL CIRCUIT COURT OF AUSTRALIA

*TAO & ANOR v MINISTER FOR
IMMIGRATION & ANOR*

[2016] FCCA 2669

Catchwords:

MIGRATION – Administrative Appeals Tribunal (Migration & Refugees Division) – Partner (Temporary) (Class UK) visas – whether the Tribunal made an error in making its decision – no arguable jurisdictional error identified – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5F, 65, 359A, 476.

Migration Regulations 1994, r.1.15A(3), Schedule 2 - cl.820.211.

Federal Circuit Court Rules 2001, r.44.12

Cases cited:

Spencer v Commonwealth of Australia (2010) 241 CLR 118

First Applicant:	MEIYING TAO
Second Applicant:	JIAYING HU
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	SYG 1505 of 2016
Judgment of:	Judge Street
Hearing date:	14 October 2016
Date of Last Submission:	14 October 2016
Delivered at:	Sydney
Delivered on:	14 October 2016

REPRESENTATION

The Applicants appeared in person.

Solicitors for the Respondents: Ms S Shangha
Mills Oakley Lawyers

ORDERS

- (1) The application is dismissed under r.44.12 of the *Federal Circuit Court Rules* 2001.
- (2) The Applicants pay the First Respondent's costs fixed in the amount of \$3,606.00.
- (3)
- (4)
- (5)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 1505 of 2016

MEIYING TAO

First Applicant

JIAYING HU

Second Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Background

1. This is an application within the Court's jurisdiction under s.476 of the *Migration Act 1958* (Cth) ("**the Act**") in respect of the decision of the Administrative Appeals Tribunal ("the Tribunal") made on 18 May 2016 affirming the decision of the delegate not to grant the applicants Partner (Temporary) (Class UK) visas.
2. The first applicant and her daughter, the second applicant, are citizens of China. The first applicant first arrived in Australia on 28 June 2012

on a Subclass 676 visitor visa. The first applicant's last substantive visa ceased on 27 April 2013. The first applicant's daughter arrived in Australia on 27 November 2011 on a Subclass 571 student visa.

3. On 9 April 2013, the first applicant married an Australian citizen. On 21 May 2013, the first applicant applied for a Partner (Temporary) (Class UK) visa under s.65 of the Act on the basis of her marriage to the Australian citizen. On 2 July 2014, the Department was advised that the relationship between the first applicant and her husband had broken down and that the first applicant had suffered family violence.

The Delegate's Decision

4. On 10 October 2014, the delegate refused to grant the applicants the visa on the basis that the first applicant did not satisfy cl.820.211 of the *Migration Regulations 1994* ("the Regulations") because there was insufficient evidence that the parties were ever in a genuine spousal relationship. It was in these circumstances that the delegate found it was unnecessary to consider the issue of family violence or the Schedule 3 criteria.

The Tribunal's Decision

5. The applicants appeared before the Tribunal at hearings on 8 June 2016 and 17 May 2016 to give evidence and present arguments. The applicants were also represented by a migration agent, and the Tribunal received evidence from four other persons.
6. The Tribunal identified that the relevant question being raised in the case was firstly, whether the first applicant and her husband were in a spousal relationship at the time of the visa application. The Tribunal identified the further potential questions as to whether there were compelling reasons not to apply the Schedule 3 criteria and whether the first applicant suffered family violence committed by the husband.
7. The Tribunal identified the importance of determining whether the applicant was in a spousal relationship in accordance with cl.820.211(2)(a) of the Regulations and the definition of spouse in s.5F of the Act and the mandatory considerations required under r.1.15A(3) of the Regulations. The Tribunal identified having provided information under cover of a s.359A of the Act letter to the applicants

to the effect that the marriage was contrived for migration purposes only.

8. The Tribunal found that the first applicant had conceded that she provided false information to the Department about the history of her relationship with her husband. The Tribunal found that the first applicant compounded the problem by continuing to provide false information to the Tribunal during the hearing on 8 January 2016.
9. The Tribunal found the first applicant gave evidence that was flexible according to the circumstances. The Tribunal found the first applicant was prepared to tell the decision-maker whatever she thinks the decision-maker wants to hear. The Tribunal found that the first applicant was prepared to provide false information to the Department about her circumstances in order to obtain a desired visa outcome or a waiver of visa condition.
10. The Tribunal did not find any of the witnesses particularly compelling. While the Tribunal accepted there was an altercation, it did not accept that that meant that the parties were in a spousal relationship. The Tribunal was not prepared to accept the evidence of the first applicant about the nature of the relationship. The Tribunal was not prepared to accept the first applicant's evidence concerning the financial aspects of the relationship and the nature of the household.
11. The Tribunal accepted that there may well have been some social arrangements between the parties. However, the Tribunal did not accept that the parties saw the relationship as long-term. The Tribunal was not prepared to accept that the applicant and her husband ever had a mutual commitment to a shared life together, to the exclusion of others. The Tribunal was not prepared to accept that there was a genuine and continuing relationship.
12. The Tribunal was not satisfied that, at the time of the application, the parties were in a spousal relationship. Accordingly, the Tribunal found that the first applicant did not meet the criteria under cl.820.211(2)(a) of the Regulations and that this was an essential criterion for the grant of a visa. It was in those circumstances that the Tribunal affirmed the decision not to grant the applicant's Partner (Temporary) (Class UK) visas.

Proceedings before this Court

13. At the commencement of the hearing, the Court explained to the applicants that this was a show cause hearing under r.44.12 of the *Federal Circuit Court Rules 2001* to determine whether the applicants had an arguable case. The Court explained that a show cause hearing required the Court to be satisfied that the applicants had an arguable case that the Tribunal's decision was affected by relevant legal error.
14. The Court explained that the relevant legal error had to be either an excess of statutory power or a denial of procedural fairness to the applicants. The Court explained that, in summary, this meant it was considering whether the applicants had a reasonably arguable case that the Tribunal's decision was unlawful or that the Tribunal's decision was unfair.
15. The Court explained, that if satisfied the Tribunal's decision was the subject of a reasonable argument of relevant error, the matter would be fixed for hearing on another occasion. The Court explained that if not satisfied that the Tribunal's decision was the subject of a reasonable argument of relevant legal error, the application would be dismissed.
16. The Court explained that it would have identified the evidence, then hear submissions from the applicants, then hear submissions from the solicitor for the first respondent and, then hear submissions from the applicants in reply.
17. The first applicant on behalf of the applicants, who were both in Court, confirmed that she understood the nature of the hearing as explained by the Court. No submissions were advanced by the applicants from the bar table. The grounds of the application are as follows:-

1. Administrative Appeals Tribunal made an error in making the decision.

18. I take into account the principles and caution in *Spencer v Commonwealth of Australia* (2010) 241 CLR 118, at [24]-[25] and [59]-[60]. The bare assertion that the Tribunal made an error in making its decision does not disclose any arguable jurisdictional error. On the face of the material before the Court, the Tribunal complied with its statutory obligations in the conduct of the review. On the material

before the Court, the Tribunal complied with its obligations of procedural fairness to the applicants.

19. The application fails to disclose any arguable case of jurisdictional error. I am clearly satisfied that this is an appropriate case in which to exercise the Court's powers under r.44.12 of the *Federal Circuit Court Rule 2001*.
20. The application is dismissed under r.44.12 of the *Federal Circuit Court Rules 2001*.

I certify that the preceding twenty (20) paragraphs are a true copy of the reasons for judgment of Judge Street

Date: 4 November 2016